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Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

No. 03-1063

IN THE

Supreme Court of the United States

KEITH H. JONES,

Petitioner,

v.

FLOWSERVE US INC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

C. MICHAEL HART
TAYLOR, PORTER, BROOKS & PHILLIPS, L.L.P.
Attorneys for Respondent
P.O. Box 2471
Baton Rouge, LA 70821
(225) 387-3221

186617

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STATEMENT PURSUANT TO RULE 29.6

Respondent Flowserve US Inc is wholly owned by Flowserve Corp, which is publicly traded. Flowserve, FDC Corporation, Flowserve FSD Corporation, Flowserve, Inc., and Flowserve Red Corporation, defendants below, no longer exist and the assets of the corporation which manufactured the subject valve were rolled into the Respondent. Flowserve US Inc is the successor to the Duriron Company, Inc. Wherever the record refers to "Duriron" or "Flowserve" the proper entity would be Flowserve US Inc.

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STATEMENT OF THE CASE

A. Facts

Keith Jones was injured when bolts holding the two pieces of a valve together broke as he opened a valve on a brine tank at PPG Industries, Inc.'s ("PPG") Lake Charles, Louisiana facility. The valve was manufactured by The Duriron Company, Inc., now known as Flowserve US Inc.

At some time prior to 1977, PPG purchased valves from Duriron for testing by PPG. As a result of those tests, PPG declared that the T-41 plug valve was fit for use in the Lake Charles facility and specified that it be used. The valve, as tested by PPG, was built with a carbon steel body and used austenitic stainless steel bolts (304 Stainless Steel) to hold the top works of the valve onto the body. PPG imposed no restrictions or limitations on the valve, which was manufactured using the industry-standard materials in use at that time; specifically, bolts manufactured from 304 Stainless Steel, an austenitic stainless steel.

Prior to 1984, the standard bolting for valves in chlorine service, as established by the Chemical Manufacturers Association, was 304 Stainless Steel. PPG was, and is, a member of this industry organization, and was fully aware of the research and recommendations for selection of material to be used in various applications.

In 1984, the Materials Technology Institute, a "think tank" for the Chemical Manufacturers Association, wrote a report that concluded that carbon steel should be used for bolting in valves placed in chlorine service. However, PPG,

and more specifically, Don Haines, the PPG-Lake Charles engineer responsible for material selection, knew that it was industry practice to use stainless steel bolting throughout the 1980's and into the 1990's. Haines also knew that PPG-Lake Charles was still using valves with stainless steel bolting at the time of his deposition taken more than three years after Keith Jones' accident.

Chlorine manufacturing facilities create a harsh environment, both for the men and women who work in them and for the equipment installed there that is continually exposed to a wide range of chemicals, temperatures, and operating conditions. Unprotected steel corrodes quickly, and that is why, before 1984, the chemical industry chose 304 Stainless Steel as the material for bolting in the severe environment of chlorine plants, for 304 Stainless Steel was much less susceptible to surface corrosion.

However, austenitic stainless steel is not without its own shortcomings. While it offers superior resistance to surface corrosion, it is susceptible to chloride stress corrosion cracking in environments where high concentrations of chlorides are present. The evidence submitted in the records establishes, without dispute, that both PPG and The Chemical Manufacturers Association were aware of the risk of bolt failure from chloride stress corrosion cracking well before the subject valve was ever manufactured. Notwithstanding the risk of failure from chloride stress corrosion cracking, the position taken by Chemical Manufacturers Association, and the engineering staff of PPG Lake Charles before 1984 was that the benefits of superior surface corrosion resistance outweighed the risk of stress corrosion cracking.

After 1984, the Chemical Manufacturers Association changed its position on the use of austenitic stainless steel in areas where high concentrations of chlorides were present, but the engineering staff of the Lake Charles PPG facility did not. PPG-Lake Charles continued to use valves with 304 Stainless Steel bolting through the date of Mr. Jones' accident, and was still using valves with austenitic stainless steel bolting at the time the instant suit was filed.

This is not to suggest, however, that PPG Industries was unaware of the change in the Chemical Manufacturers Association's position. PPG is a world leader in the area of chemical manufacturing and possesses knowledge and expertise commensurate with its position. Indeed, the PPG facility in Natrium, West Virginia, also manufactured chlorine, yet its engineering staff decided as far back as 1969 that the risks of using 304 Stainless Steel in a high chloride environment outweighed the benefits, and directed that carbon steel (B7) bolting be used on valves in their facility.

PPG holds itself out to the public as a major supplier of protective and industrial coatings, and has such specialized expertise on its staff that it manufactures and markets a product under their trade name of Pitt-Therm that is a protective coating to be used on austenitic stainless steels to provide protection against chloride attack and chloride stress corrosion cracking. It is disingenuous for anyone, Petitioner or otherwise, to suggest that PPG Industries, Inc., is not thoroughly knowledgeable about the effects of chloride stress corrosion cracking. Indeed, after Mr. Jones' accident, engineers from PPG's Lake Charles plant had discussions with Mr. Al Spence, a materials specialist at the Natrium, West Virginia Facility, over what material should be used for bolting. After rejecting Spencer's recommendation to use

carbon steel (B7), Flowserve was asked by PPG's Don Haines for Flowserve's opinion on PPG's proposed continued use of valve bolting made from a different alloy of austenitic stainless steel, (Alloy 20). Flowserve recommended that PPG-Lake Charles follow the Chemical Manufacturer's Association recommendation of using carbon steel (B7) bolting; however, Mr. Haines and the management of PPG Lake Charles decided to ignore Flowserve's recommendation. When asked about this decision in his deposition, Mr. Haines testified as follows:

> Q. Did you feel comfortable in your decision for the Lake Charles plant to use Alloy 20 [an austenitic stainless steel] in the face of the manufacturers' recommendation to not use it?
>
> A. Yes.
>
> Q. And likewise, you felt comfortable in y'alls decision to select Alloy 20 for the Lake Charles plant in light of Mr. Spencer's disagreement and decision to use B7 carbon steel for the Natrium plant?
>
> A. Yes.

(Depo. D. Haines, Ex. "Q", p. 76/ln.18 – p. 79/ln.16; parenthetical explanation added)

At the time the subject valve was manufactured, the chemical industry standard for valve bolting was 304 Stainless Steel. The Duriron Catalog insert for the valve showed that the bolts were manufactured from 304 Stainless

Steel. That is not to suggest that the valves were not available with any other material; rather, the valve could be ordered with bolts manufactured from any material desired that provided the tensile strength required. PPG's Natrium, West Virginia, plant specified that their valves be delivered with carbon steel bolting, and numerous other special alloys were available as well; however, PPG-Lake Charles knew that it was ordering, and receiving valves with 304 Stainless Steel bolting.

B. The Dr. Morse Affidavit

Plaintiff's expert, Dr. John Morse, submitted an expert report in accordance with the Scheduling Order issued by the District Court. In that report he criticized the use of 304 Stainless Steel bolting on the valve, and opined that Flowserve should have provided a warning with the valve concerning the dangers of use of austenitic stainless steels in high chloride environments. Dr. Morse offered no opinions about any defects in the design of the valve; in fact, nowhere in his report did he even once use the term "defective design."

In his deposition, Dr. Morse continued with his criticism over the lack of any warning about the specific use to which this valve was subjected and the lack of any warning by Flowserve. Not only was his criticism centered on his warning theory, that was the only theory of product defect Dr. Morse provided in his deposition.

Furthermore, Dr. Morse failed to address alternative designs, a requirement under the Louisiana Product Liability Act (La. R.S. 9: 2800.56 *et seq.*) to prove a defective design case.

In the Petitioner's opposition to Flowserve's Motion for Summary Judgment, Dr. Morse submitted an affidavit that, for all intents and purposes, rewrote his initial report and attempted to set forth an opinion that attempted to meet the requirements for proving a design defect. Flowserve moved to strike the affidavit on the grounds that it attempted to add new product defect theories that were not disclosed timely. It was for that reason that the District Court struck the affidavit of Dr. John Morse that was submitted with Jones' Opposition Memorandum to Flowserve's Motion for Summary Judgment.

C. Procedural History

Keith Jones filed this lawsuit against Flowserve Corporation and its predecessor, the Duriron Company, Inc. on August 16, 1999 in the Fourteenth Judicial District Court in Calcasieu Parish, Louisiana. The matter was timely removed to the United States District Court for the Western District of Louisiana, Lake Charles Division.

In March, 2002, Flowserve filed a Motion for Summary Judgment as to all claims. The Summary Judgment was granted on May 17, 2002, dismissing all of plaintiff's claims.

Mr. Jones subsequently perfected an appeal to the United States Court of Appeals, Fifth Circuit. On August 21, 2003, the Fifth Circuit issued its opinion affirming the Judgment. Thereafter, Jones filed a Petition for Rehearing with the Fifth Circuit Court of Appeals which was denied on October 21, 2003.

Jones filed a Petition for a Writ of Certiorari with the Court on or about January 20, 2004.

Respondent sought and obtained an order for extension of time to file their opposition until March 26, 2004.

ARGUMENT

A. The Morse Affidavit Was Properly Excluded

The District Court was correct in excluding the affidavit of Dr. Morse on the grounds that the affidavit was an untimely attempt to revise and expand his original report submitted in compliance with the Scheduling Order issued by the district court. Even though the court of appeals opined that the district court may have abused its discretion by striking a portion of the affidavit, Respondent suggests that the district court did act within its discretion by striking the affidavit.

A close examination of Morse's report shows that his criticism is never directed at the design of the valve, rather he focuses on the selection of 304 Stainless Steel as an inappropriate material for bolting in that specific application, and argued that Flowserve should have provided a warning to PPG about the risk of chloride stress corrosion cracking. It is noteworthy that nowhere in Morse's report does he ever suggest that the valve was defectively designed, nor does he ever use the phrase "defective design." Respondent suggests that it is difficult, if not impossible, for an expert to describe a design defect without using those words even once in his report.

The evidence submitted showed that the Lake Charles PPG facility knew the standard valve came equipped with 304 Stainless Steel bolting, and that PPG also knew that the valve could be ordered with bolting made from any material that PPG specified. The report by Dr. Morse could just as

well be describing an application error by the engineers at PPG as it does a design defect, especially when considered that the "design" of the valve allowed the user to select whatever bolting material it desired, and that PPG routinely specified other metals for the valve.

The failure of Dr. Morse's report to address a true "design" defect, coupled with the failure of the report to provide an alternative design, gave the district court good grounds to strike the affidavit of Dr. Morse.

B. Even If The Affidavit Was Improperly Excluded, It Was Harmless Error

1. Harmless Error

Although Respondent disagrees with the court of appeals' determination that the district court may have abused its discretion by striking a portion of Dr. Morse's affidavit, the Fifth Circuit was correct in its analysis that the abuse of discretion, if any existed, was harmless error.

The material stricken from Morse's affidavit did not provide any evidence whatsoever to provide support for at least two elements of proof required to prove a design defect under La. R.S. 9:2800.56. First, neither the report, deposition, nor the affidavit by Morse provide any evidence for whether the potential for damage created by using stainless steel outweighed the attendant burden in Flowserve and the adverse effect of the use of carbon steel on the valve's utility. This evidence becomes even more important when considered in light of the refusal of PPG's Lake Charles management to use carbon steel bolts when that recommendation was made by both Flowserve and other PPG engineers after the accident.

Furthermore, both the court of appeals and the district court found that the portions of Morse's affidavit that, for the first time, suggested alternative designs as required by the Louisiana Product Liability Act, were properly excluded. Petitioner argues that the portion of Dr. Morse's affidavit that addressed the crevice between the body and the top works of the valve should have been admitted; however, the court of appeals noted that neither contention satisfied Federal Rule of Civil Procedure Rule 26(a)(2)(B). Because there was no evidence in the record concerning alternative designs, or of the balancing of the potential for damage of the current design being outweighed by the adverse effect of the proposed new design, the defective design claim was properly dismissed.

C. PPG Is Responsible For The Selection Of Materials To Be Used In Their Facilities

Petitioner has argued that the responsibility for PPG's use of a valve with stainless steel bolting belongs to the manufacturer, Flowserve, and not to the plant owner, PPG. PPG ranks among the world leaders in the area of chemical process and its safe operation, and is responsible for the selection of devices and materials to be used within its facilities. Material selection is, and has been, the duty of the chemical plant owner.

PPG did not ask Flowserve to recommend a valve and the materials from which it was made; rather, PPG specified the type, size and materials for valves it desired to purchase. PPG knew it would receive a valve with 304 Stainless Steel bolting **unless** it specified a different material selection. PPG did, under some circumstances, order the same type valve from Flowserve with non-standard bolting.

Moreover, PPG-Lake Charles never disclosed to Flowserve where any specific valve might be destined for use in their plant. PPG maintained a warehouse on-site with a supply of spare valves on hand. The specific use, or the specific environment, for any valve was never known by PPG until the warehouse received a requisition from its maintenance group, who only at that time knew where the valve would be used. Flowserve was never told where in the plant its valves would be used.

This accident is more properly the responsibility of the management of the PPG-Lake Charles facility and its materials engineer, Mr. Don Haines. PPG (the operator) and Mr. Haines were responsible for the selection of materials to be used in the plant, and they knew all the factors to consider when making that selection. Therefore, the accident is not because the valve failed to perform as intended; rather, it was caused by Mr. Haines' attempt to rely on 304 Stainless Steel to be the best material selection when other materials may have been better suited for the specific uses to which he put the valve.

D. Flowserve Did Not Breach Any Duty To Warn

1. PPG is a sophisticated user of industrial valves

Section 2800.57 of the Louisiana Products Liability Act (La. R.S. 9:2800.57) states:

> (1) "the product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product with the ordinary knowledge common to the community as to the products characteristics"; or

(2) "the user of handler of the product already knows or reasonably should be expected to know of the characteristic of the products that may cause damage and the danger of such characteristic."

(La. R.S. 9:2800.57)

The law in this issue is clear – a manufacturer is under no duty to warn a user about a particular danger when the user is already aware, or should reasonably be aware, of that danger. The Fifth Circuit Court of Appeals has been explicitly clear on this point on numerous occasions, stating that "the manufacturers duty to warn of limitations associated with a particular product is **without application in those instances where in the party either knows or should know of the limitations and restricted capabilities of the article."** *Mozeke v. International Paper Co.*, 933 F.2d 1293, 1297 (5th Cir. 1991) (emphasis added). Furthermore, a manufacturer has no duty to warn the employees of a purchaser when the employer knew, or should have known, of the risks, and had a duty to warn and train its employees about these risks. *Davis v. Avondale Industries, Inc.*, 975 F.2d 169 (5th Cir. 1992); *Washington v. Department of Transportation*, 8 F.3d 296, 300 (5th Cir. 1993); and *Scallan v. The Duriron Company, Inc.*, 11 F.3d 1249, 1252 (5th Cir. 1994).

PPG is a sophisticated chemical company. It is a world leader in the areas of safe chemical production, corrosion, and corrosion protection. By its own admission, it has the expertise internally to access risks, select materials necessary for the safe operation of its plants, and can do so without relying on advice from the manufacturers of the many devices

that are installed in its plants. (Depo. D. Haines, Ex. "Q", p. 77/ln. 8-25; Ex. "G", Ex. "H"). It simply cannot seriously be contended that PPG is not a sophisticated user.

2. PPG had Actual Knowledge of Every Fact and of Every Risk Encountered

Notwithstanding its status as a sophisticated user, the record is overwhelmed with evidence demonstrating that PPG had actual knowledge of the risk of stress corrosion cracking with the use of austenitic stainless steels in areas with high chloride environments.

Haines admitted that PPG received the catalog literature for the valve, even though the product literature that PPG possessed in 1981 was not retained after newer literature was received. (Depo. Haines, Ex. "Q", p. 24/ln. 5 – p. 28/ ln.25) When shown the Durco product literature from June, 1981, Mr. Haines admitted that the product literature showed the top cap bolts to be made of 304 Stainless Steel. (Durco Product literature, Ex. "E"; Depo Haines, Ex. "Q", p. 121/ ln. 9 – p. 123/ln. 4)

The PPG specification for the valve that was in effect from January, 1976 until December, 2001 called for a Durco T-41 valve, and specifically included the following: "Plug [valve], 150#[lb.] flanged ASTM A395 Ductile Iron Body, plug and cap; Teflon lined body and plug; lockout collar required." (PPG 1976 valve specification dated 1/76, Ex. "C") The 1976 specification did not specify what material was to be used for bolting, nor did it take exception to any of the materials listed in the product literature. PPG has no records of ever receiving a Durco valve that did not comply with the PPG specification under which the valve was

ordered. (Depo. J. Williamson, Ex. "R", p. 19/ln. 8-12; p. 19/ln. 21 – p. 22/ln. 14)

Indeed, during the same general time period, other PPG locations ordered the same model Durco valve, but specified a type of bolting that was different from the standard, and received the same model Durco valve with the type of bolting specified by the other PPG facility. (Depo. A. Spencer, Ex. "U", p. 29/ln. 12 – p. 32/ln.17)

Perhaps a clearer picture of what Don Haines and the Lake Charles PPG plant knew about valve bolting issues, material selection, and Stress Corrosion Cracking can be seen in the Interoffice Memo drafted by Mr. Haines some three weeks after the Jones' accident. (PPG Interoffice Memo from D. Haines, dated September 11, 1998, Ex. "K") In that memo, Mr. Haines describes the accident of August 17, 1998, as opening up an "old subject that seems difficult to resolve." Haines acknowledges that both carbon steel *and* stainless steel are "subject to some kind of corrosion when exposed to a chloride environment," and that "the high stresses in bolting make them more likely to fail catastrophically than most types of components." (PPG Interoffice Memo from D. Haines, dated September 11, 1998, Ex. "K")

Mr. Haines testified that he had been employed at the Lake Charles facility since 1975, and that he had been aware of Stress Corrosion Cracking and had witnesses it in failures at PPG for "the last 25 years." (Depo. D. Haines, Ex. "Q", p. 44/ln. 17-21) While not a metallurgist, Mr. Haines had learned a significant amount of information about Stress Corrosion Cracking from his work experience. Mr. Haines knew enough about Stress Corrosion Cracking to know that the risk of Stress Corrosion Cracking occurring in some areas

of the plant were greater than in other areas, and he, individually, was aware that the area where the subject valve was installed by PPG was an area more susceptible to stress corrosion cracking than other areas. (Depo. D. Haines, Ex. "Q", p. 44/ln.22 – p. 45/ln. 15; p. 46/ln. 14-18)

Without considering the knowledge held by PPG's corporate engineering staff on this issue, Mr. Haines had gathered a lot of information about stress corrosion cracking during the 25 years he worked for PPG before Mr. Jones' accident. For example, Mr. Haines had actual knowledge of the presence of stress corrosion cracking at the Lake Charles facility through numerous prior incidents of stress corrosion cracking in stainless steel at their facility. The Lake Charles PPG facility used stainless steel tubing, and had found stress corrosion cracking to occur in the tubing; stress corrosion cracking had occurred in vessel walls in the PPG facility; stress corrosion cracking had occurred in some equipment used by PPG, to include bucket elevators; and stress corrosion cracking had occurred in piping. (Depo. D. Haines, Ex. "Q", p. 43/ln. 9 – p. 43/ln. 20)

Mr. Haines initially denied having any knowledge of any prior occurrences of stress corrosion cracking failures in stainless steel bolting before this accident.

Q: Ever had any other bolts fail from stress corrosion cracking?

A: We have had—oh, yes. We have, but different types of stress corrosion cracking. We have had nickel or inconel bolts crack from high temperature caustic environment. You know, I knew this question was going to come up,

and I started asking myself if I had seen that before. And, um, I couldn't place my – finger on it whether I had seen it in bolting, in stainless steel bolting before. **And I just don't recall seeing it in the stainless steel in an external environment before.** (Emphasis added)

Q: Fair answer. Would It be fair then to say then that you have been aware of stress corrosion cracking and have witnessed it in failures of other items for the past 25 years?

A: Yes.

(Depo. D. Haines, Ex. "Q", p. 44/ln. 4-21)

However, after Mr. Haines was shown his September 11, 1998 memo (Ex. "K") and asked about "the two locations where we have had a problem . . . ," he admitted that the Lake Charles PPG facility had suffered a failure of stainless steel bolting on a similar Durco valve about six months before Mr. Jones' accident (Depo. D. Haines, Ex. "Q", p. 55/ln. 13 – p. 57/ln.13). Fortunately, no one was injured in that failure; unfortunately for Mr. Jones, no investigation was conducted to look into the cause of the failure or what action might be necessary to prevent a re-occurrence (Depo. D. Haines, Ex. "Q", p. 58/ln. 5-17).

The deposition of Mr. Al Spencer, Mr. Haines' counterpart at another PPG chlor-alkaline facility similar to the PPG facility in Lake Charles, was taken to further establish the scope of actual knowledge of PPG with respect to stress corrosion cracking and selection of bolting materials

for use on valves that are installed in a high chloride environment. Mr. Spencer testified that he had not allowed the use of stainless steel bolting valves placed in brine service in the Natrium, West Virginia, plant since 1969 because of the possibility of stress corrosion cracking. Furthermore, even though the standard Durco valve had 304 Stainless Steel bolts installed, he and his plant specified the same valve with B7 (carbon steel) bolting, and those valves were produced and delivered to PPG-Natrium with B7 bolts, as specified. (Depo. A. Spencer, Ex. "U", p. 29/ln. 12 – p. 32/ln. 17)

3. There is No Duty to Warn When Such Warning Would be Futile

Petitioner argues that the valve was defective because it did not have B7 (carbon steel) bolting; and failing that, the valve is unreasonably dangerous because the product literature did not contain warnings about the risk of Stress Corrosion Cracking in high chloride environments and that a bolting failure might lead to a catastrophic failure.

First, PPG suffered a failure of stainless steel bolting used in a steam and salt water environment from stress corrosion cracking six months before the accident. Regardless of the tremendous body of expert technical knowledge held by PPG corporate-wide, this one event put the Lake Charles facility on notice that some, if not many, of its valves had stainless steel bolting securing the top works, and that those bolts can fail from stress corrosion cracking. Furthermore, the Lake Charles facility, and Mr. Haines, had actual knowledge of all the other stress corrosion cracking failures over the years involving components made from stainless steel.

Nonetheless, when the valve bolting broke six months before the August 17, 1998 accident, and this information was made perfectly clear, no action was taken. Even though Mr. Haines admitted that there were "lots" of other valves in use at the plant that have stainless steel bolting (Depo. D. Haines, Ex. "Q", p. 45/ln. 16- p. 46/ln. 7), and that he had no list of those valves that did use stainless steel bolting (p. 54/ ln. 1-12) at any time **before** the August 17, 1998 accident. And while Haines tried to argue that he might have taken some action he known that the subject valve had stainless steel bolts, he took no action for any of the "lots" of other valves that he did know had stainless steel bolting. (Depo. D. Haines, Ex. "Q", p. 49/ln. 22 – p. 128/ln. – p. 129/ln. 3)

Amazingly, Mr. Haines tried to hide behind his assertion that "he was never told that this particular valve was coming in with stainless steel bolts," before he finally admitted that even if he had known that this specific valve was coming in with stainless steel bolting, that it would have been put into service, and that it would have been treated like all of the other valves with stainless steel bolting at the plant (Depo. D. Haines, Ex. "Q", p. 49/ln. 1 – p. 50/ln. 10).

Perhaps the best evidence of the futility of any warning by the manufacturer to the Lake Charles PPG plant is the rejection of Durco's recommendations to Mr. Haines after the August 17, 1998 incident. After the accident, Mr. Haines consulted with Mr. Tom Spence, Durco's materials specialist, and Mr. Al Spencer, the materials engineer at PPG's Natrium, West Virginia facility. Mr. Haines told both Spence and Spencer of his plant's intention to begin using Alloy 20 bolting on all valves in the Lake Charles plant, Alloy 20 being an austenitic stainless steel that is less susceptible, but not immune, to stress corrosion cracking in chloride

environment. Both Mr. Spence and Mr. Spencer recommended against the use of Alloy 20 bolting because Alloy 20 was still susceptible to stress corrosion cracking (not, as Mr. Haines wrote in his September 11, 1998 memo (Ex. "K"), "not subject to Chloride Stress Cracking", and, because Alloy 20 bolts usually lacked the tensile strength required of valve bolts. Mr. Haines and the Lake Charles—PPG Operational Review Committee rejected both recommendations. Ironically, the Lake Charles PPG plant then revised its valve specification to require custom-made Alloy 20 bolts that had to be specially treated to provide the tensile strength required to secure the top works to the valve body. Therefore, the only time in the past 25 years that PPG-Lakes Charles contacted this valve manufacturer for advice on material selection resulted in the rejection of the manufacturers recommendation, with the following justification:

> Q. Did you feel comfortable in your decision for the Lake Charles plant to use Alloy 20 in the face of the manufacturers' recommendation to not use it?
>
> A: Yes.
>
> Q: And likewise you felt comfortable in y'alls decision to select Alloy 20 for the Lake Charles plant in light of Mr. Spencer's disagreement and decision to use B7 carbon steel for the Natrium plant?
>
> A: Yes.

(Depo. D. Haines, Ex. "Q", p. 76/ln. 18 – p. 79/ln. 16)

Duriron provided alternative materials for bolting, and PPG knew this. If PPG wanted to have a much higher degree of protection from both general corrosion and stress corrosion cracking, it could have specified exotic alloys such as Monel or Hastelloy-C, assuming that PPG would be willing to pay for those expensive materials. These alternative bolting alloys were made available by Duriron, and were not selected by PPG.

E. There Are No Compelling Reasons To Grant The Petition

Rule 10 of the Rules of the Supreme Court of the United States provides that a Petition for a Writ of Certiorari is only granted for compelling reasons, and that "a Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

There are no compelling reasons for granting Keith Jones' Petition. Mr. Jones was injured as a result of the fault of his employer. Both lower courts found that Mr. Jones failed to adequately prove his claim of a product defect under the Louisiana Products Liability Act. Keith Jones simply complains that the lower courts made erroneous evidentiary rulings under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 469 (1993), and its progeny; Rules 26 and 56 of the Federal Rules of Civil Procedure; and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). There is nothing more than that.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

C. MICHAEL HART
TAYLOR, PORTER, BROOKS
& PHILLIPS, L.L.P.
Attorneys for Respondent
P.O. Box 2471
Baton Rouge, LA 70821
(225) 387-3221